

Homes for New Hampshire's Future

Land Use Tools for Mixed-Income Housing

The Legal Background. New Hampshire is not a “home rule” state, so all municipal power derives from a Legislative grant. RSA 672:1,III-e states that housing that is affordable to low- and moderate-income households “should not be prohibited or discouraged by use of municipal planning and zoning powers or by unreasonable interpretation of such powers.” The NH Supreme Court held in *Britton v. Town of Chester*, 134 N.H. 434 (1991), that municipalities are obliged to provide such households with a realistic opportunity to obtain affordable housing, and that a municipality’s zoning cannot be used prevent “outsiders of any disadvantaged social or economic group” from locating there. But the early promise of *Britton* has remained largely unfulfilled, as its enforcement can only be made on a town-by-town basis, and attempts in the Legislature to codify the decision have failed.

Smart Growth. In 2000, the Legislature adopted RSA 9-B, the state’s smart growth policy. This statute contains many of the principles common to many smart growth approaches, but it notably omits any discussion of affordable or mixed-income housing. Rather, it focuses on patterns of development and the land use impact of state investments (including grants, loans, and municipal pass-through funding). Because this law is largely unimplemented, its promise too remains unfulfilled. Note that the Legislature is constitutionally constrained against imposing municipal “unfunded mandates.” So as it applies to municipalities, the state’s smart growth law is only a good idea.

Inclusionary Zoning (IZ). This is authorized by statute solely as a *voluntary* mechanism for municipalities to offer to developers. Municipalities wishing to use IZ must carefully examine the possible incentives for their true economic efficacy—i.e., the developers profit margins cannot be reduced, but must be increased (or at least remain unchanged). RSA 674:21, IV contains a non-exclusive list of incentives: density bonuses, growth control exemptions, and a streamlined application process. The statute specifically identifies low- and moderate-income impact as the goal to be sought through IZ. Several municipalities have adopted IZ, with limited application so far.

Subsidy Retention. To accompany a municipality’s inclusionary zoning ordinance, New Hampshire Housing has developed a model ordinance to retain the affordability of units designated to benefit low- and moderate-income households. The model requires a fixed initial sale price for affordable units (tied to 80% area median income), but unlike other measures, this model allows subsequent sale prices to float with the market. Affordability is maintained through a municipally-held lien that is indexed by the CPI. This model is presently being deployed.

“Innovative” Land Use Controls. RSA 674:21 generally enables municipalities to be creative with their zoning. Its non-exclusive list includes cluster development, flexible and discretionary zoning, and accessory dwelling units. NH municipalities have only begun to tap the broad authority of this statute.

Local Tax Policy. The Legislature recently passed the “Community Revitalization Tax Relief Incentive,” RSA 79-E, which authorizes municipalities to waive increased property taxes that are attributable to “substantial rehabilitation” of structures in downtown areas. This is defined as 15% of the pre-rehab assessed value of the structure or \$75,000, whichever is less. The tax relief may be granted at the discretion of the local governing body and is for term of up to 5 years—more if historic structures or new housing is involved. This statute is in addition to existing authority to create tax increment finance districts, which can have significant indirect impact on housing.

Education and Training. It is increasingly clear that training of local officials is an important route to achieving balanced and diverse housing development. A group of representatives from housing, conservation, industry, and government has been meeting for 1½ years to develop a technical assistance plan that includes statewide funding for local planning technical assistance to guide municipalities along joint tracks of housing and conservation. The proposal has been endorsed by a Legislative study committee. At the same time, the Workforce Housing Council is engaging the state’s business community as a new voice to promote the development of housing that is affordable to a diverse and growing workforce.

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